IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD A. DEAN, Petitioner, vs. WARDEN B. CURRY, Respondent.	No. C 09-1926 LHK (PR) ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

Petitioner, a state prisoner proceeding *pro se*, sought a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a 2007 decision by the California Board of Parole Hearings ("Board") finding him unsuitable for parole. Respondent was ordered to show cause why the writ should not be granted. Respondent has filed an answer, along with a supporting memorandum of points and authorities and exhibits. Petitioner then filed a traverse. Thereafter, Petitioner filed a supplemental petition,[1] and the Court directed further briefing. Respondent filed a supplemental answer, and Petitioner filed a supplemental traverse.[2] For the reasons set

[1] On November 8, 2010, this Court dismissed Petitioner's section 2254 petition in *Dean v. Grounds*, No. 09-5223 LHK, as duplicative, and ordered that the petition be filed as a supplemental petition in this instant case.

[2] Petitioner's motion for enlargement of time to file his supplemental traverse is granted.

forth below, the petition for a writ of habeas corpus is DENIED.

BACKGROUND

On January 21, 1991, Petitioner was sentenced to 15 years to life after being convicted of second degree murder in Los Angeles Superior Court. (Petition at 2.) On December 4, 2007, the Board found Petitioner unsuitable for parole. Petitioner then filed unsuccessful state habeas petitions in all three levels of state court. On May 4, 2009, Petitioner filed the instant petition.

DISCUSSION

As grounds for relief, Petitioner claims that the Board's decision to deny him parole violated: (1) his right to due process, (2) his right to equal protection, and (3) the terms of his plea agreement.

A. Standard of Review

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, that is, falls under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that

principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. *See id.* at 409.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." *Miller-El*, 537 U.S. at 340. Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. at 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000). The standard of review under AEDPA is somewhat different where the state court gives no reasoned explanation of its decision on a petitioner's federal claim, and there is no reasoned lower court decision on the claim. In such a case, a review of the record is the only means of deciding whether the state court's decision was objectively reasonable. *See Plascencia v. Alameida*, 467 F.3d 1190, 1197-98 (9th Cir. 2006).

B. Analysis

1. Due Process

Petitioner argues that the Board's determination of unsuitability for parole was based upon improper grounds, that there was insufficient evidence to conclude that his release would unreasonably endanger public safety, and that the Board should have considered or set a term of release. In order to comport with due process, a prisoner is only entitled to "an opportunity to be heard and [be] provided a statement of the reasons why" parole was denied. *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011) (per curiam); *see Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U. S. 1, 7 (1979) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners."). Moreover, a federal habeas court cannot review sufficiency of the evidence claims to analyze whether "some evidence" supports the Board's decision to deny parole. *See Swarthout*, 131 S. Ct. at 861. "Because the only federal right at

issue is procedural, the relevant inquiry is what process [Petitioner] received, not whether the state decided the case correctly." *Id.* at 863. Regardless of which particular factors were considered or relied upon by the Board, Petitioner was provided an opportunity to rebut their validity, and given an explanation of the Board's ultimate decision. Those were the only due process rights to which he was entitled. Thus, Petitioner's due process claim is denied.

2. Equal Protection

Petitioner claims that the Board violated his equal protection rights when they failed to consider a parole release date for him under California Penal Code § 3041(a), but set an immutable release date for Mikael Schiold, a Swedish national. Petitioner argues that Schiold received a specific release date when his term was set without him first having been found suitable for parole under § 3041(b). The state had apparently entered into a settlement agreement with Schiold that provided for his transfer to his home country and for his release from prison on a date certain. (Petition, Ex. J.)

An equal protection claim may be brought by a "class of one" when a petitioner alleges he has been treated differently from others similarly situated and that there is no rational bases for the difference in treatment. *SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002). Under the rational basis test, the action does not violate equal protection if there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.*

Here, Petitioner is not similarly situated to the other prisoner. He has not been granted a writ of habeas corpus, as Schiold had, and the State has not appealed. That is, in Petitioner's case, there is no reason for the state to enter into a compromise as it apparently did with Schiold. Thus, there is a rational basis for treating the two differently. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (per curiam) (holding that a "class of one" claim requires only that action be irrational and arbitrary, rather than requiring discriminatory intent); *see, e.g., Marroquin v. Curry*, No. 08-3153 PJH, 2010 WL 13338140, *3 (N.D. Cal. 2010) (rejecting a similar equal protection claim wherein the petitioner compared his situation to Mikael Schiold); *Mendez v. Curry*, No. C 08-4685 JW, 2010 WL 1240755, *6 (N.D. Cal. 2010) (same); *Snider v.*

Curry, No. 07-4311 PJH, 2007 WL 4106254, *1-2 (N.D. Cal. 2007) (same).

Petitioner also claims that the Board's failure to consider or set a primary term for him violated his right to equal protection. However, under California law, a life prisoner such as Petitioner must first be found suitable for parole before a parole date is set. *See In Re Stanworth*, 33 Cal. 3d 176, 183 (1982). Where, as here, the life prisoner has not been found suitable for parole, there is no obligation to set a parole release date.[3] *See generally In re Dannenberg*, 34 Cal. 4th 1061, 1070-71 (2005); 15 Cal. Code Regs. § 2403(a) ("[t]he panel shall set a base term for each life prisoner who is found suitable for parole"). Because Petitioner has not been found suitable for parole, the Board's failure to consider setting a term does not violate Petitioner's federal constitutional rights.

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[3] The Court notes that Petitioner points to a Superior Court order regarding another inmate by the name of Robert Rosenkrantz in support of his claim that the Board's action against setting a term for Petitioner merely because he was not suitable for parole was arbitrary. Petitioner claims that Rosenkrantz was found unsuitable for parole yet the Board set a prison term. (Petition at 6r and Ex. K.) Petitioner argues that he has a right to that same result.

The relevant portion of the order reads, "[Rosenkrantz] was found suitable for parole on June 18, 1996, but a review unit later disapproved of the parole grant. At subsequent hearings in 1996, 1997 and 1998, [Rosenkrantz] was found unsuitable for parole based on the gravity of his offense. On September 9, 1999, petitioner *was found unsuitable for parole but the panel set his prison term*. On November 18, 1999, Governor Davis reversed [Rosenkrantz's] parole grant. On June 30, 2000, a new panel found [Rosenkrantz] suitable for parole . . ." (Petition, Ex. K at 3.) (Emphasis added.) In this context, it appears that the Superior Court order contains a typographical error and that, in fact, in 1999, contrary to Petitioner's assertion, Rosenkrantz was found suitable for parole prior to the panel setting a prison term.

However, even assuming that the Board found Rosenkrantz unsuitable for parole in 1999 yet still set a prison term, the Court is not persuaded by Petitioner's argument. Petitioner still bears the burden or proving that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *SeaRiver Maritime Financial Holdings, Inc.*, 309 F.3d at 679. Here, Petitioner does not allege that no rational basis existed for the different treatment, nor does he allege that the difference in treatment was intentional. *Village of Willowbrook*, 528 U.S. at 564. Further, he fails to demonstrate that other similarly situated prisoners, i.e., prisoners convicted of second degree murder based on similar circumstances, have been found unsuitable for parole and still had a prison term set. *See McQueary v. Blodgett*, 924 F.2d 829, 835 (9th Cir. 1991) (recognizing that a mere demonstration of inequality is insufficient and that "the Fourteenth Amendment guarantees equal laws, not equal results"). In fact, he fails to show that even Rosenkrantz was similarly situated to him. Thus, his claim fails.

3. Plea agreement

Petitioner claims that the Board's refusal to set a term of release violated his plea agreement. Specifically, he argues that he agreed to plead guilty with the understanding that he would be sentenced to 15 years to life "with the promise of parole," and that he would be released on parole "after serving the appropriate amount of time." (Docket no. 9, "Supplemental Petition," at 6a.) The relevant portions of the plea colloquy reveal that Petitioner acknowledged that in exchange for his guilty plea, he would be sentenced to 15 years to life, and, "after serving the appropriate amount of time in state prison," Petitioner would be released on parole. (Supplemental Petition, Ex. B at 7.)

"Plea agreements are contractual in nature and are measured by contract law standards." *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003) (*quoting United States v. De la Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993)). Although a criminal defendant has a due process right to enforce the terms of a plea agreement, *see Santobello v. New York*, 404 U.S. 257, 261-62 (1971), Petitioner has not provided any evidence that there was a term of the plea agreement that has been breached.

Insofar as he means that there was an agreement for his release after "the appropriate amount of time," the claim fails because Petitioner provided no evidence that his plea bargain included a promise that he would be released on parole after he reached any specific number of years in custody. In California, an indeterminate sentence is effectively a sentence for the maximum term unless the Board acts to fix a shorter term. *See In re Dannenberg*, 34 Cal. 4th 1061, 1097-98 (2005). The plea colloquy clearly reflects that Petitioner agreed to an indeterminate sentence of 15 years to life on the second degree murder conviction. (Supplemental Petition, Ex. B at 4.) Petitioner's 15-to-life sentence has a life maximum and his plea bargain subjected him to possible life imprisonment. To the extent Petitioner argues in his traverse that he received nothing in consideration of his guilty plea, the Court disagrees. Petitioner did receive a lesser sentence, in that a first degree murder conviction would have resulted in a life sentence with a minimum of 25 years instead of 15 years. (Supplemental Petition at 6e, Ex. B at 3-4, 10.) Accordingly, the state court's rejection of Petitioner's claim

that his plea agreement was breached was not contrary to, nor an unreasonable application of, clearly established Supreme Court authority.

CONCLUSION

The petition for a writ of habeas corpus is DENIED.

Petitioner has failed to make a substantial showing that his claims amounted to a denial of his constitutional rights or demonstrate that a reasonable jurist would find the denial of his claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no certificate of appealability is warranted in this case.

The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: __3/28/11_____

LUCY H. KOH
United States District Judge